

S (A Child) (Article 16 and 18 BIIa and Article 19 EU Service Regulation) (2017)

[2017] EWHC 3768 (Fam)

18/10/2017

Barristers

Alistair G Perkins

Court

Family Division

Practice Areas

International Children Law

Judgment of Mr Justice Williams considering the issues of habitual residence, jurisdiction in accordance with article 19 of Brussels Ia, article 18 of Brussels II and article 19 of the EU service regulations.

On 7th September 2017, the father applied for orders under the inherent jurisdiction in respect of his son (“S”), who was 5 and ½ years old at the time, as his mother had failed to return him to the UK following a holiday to Spain. In particular, the father asked that S be made a ward of court, sought a Child Arrangements Order, declarations in respect of the court’s jurisdiction and a return order directing that S be returned to the jurisdiction. The father also made an application to the English Central Authority for S’s return, in accordance with the 1980 Hague Convention in respect of which there were yet to be proceedings.

On 14th September 2017, the mother issued her own application in the Spanish court in respect of which there was an urgent hearing on 15th September 2017 at which an order was made setting out what are described as “urgent provisional measures” providing for S to remain in the custody of his mother and have monthly visits with his father.

At the time of the hearing before Mr Justice Williams (“The Judge”), an order had already been made on 20th September 2017 by Mr Justice Holman which contained a number of recitals including that the court was satisfied, on a provisional basis, that S was habitually resident in the UK at the time of his departure to Spain, that S was wrongfully removed, or was wrongfully retained outside the jurisdiction, on 23rd August 2017 when he was expected to return, that S’s removal and/or retention was wrongful and in breach of the rights of custody attributed to the father which he was exercising at the time of S’s removal and retention; and that the courts of England and Wales had jurisdiction pursuant to Articles 8 and 10 BIIA.

Accordingly, at the subsequent hearing on 18th October 2017, the Judge had to determine those issues having first resolved the question of whether or not the UK court was “first seized” of the proceedings as well as consider the effects of Articles 16 and 19 of Brussels IIA.

The Decision

The Judge gave an *ex tempore* judgment in which he first dealt with the question of whether or not the UK court was in a position to determine the case and concluded that it was on the basis that it was clear that the father's application was made before that of the mother and that, therefore, the UK court was indeed first seized [25] and had jurisdiction. Accordingly, the Judge's view was that the Spanish court should have stayed its proceedings in accordance with Article 19 of Brussels IIA pending the UK court's decision with respect to jurisdiction.

Having reached that conclusion, the Judge went on to consider whether the UK proceedings should be stayed in accordance with Article 18 of Brussels II and Article 19 of the EU Service Regulation if it could be shown that the mother, being in another member state at the time of the father's application, had not been properly served and / or provided with sufficient time in which to arrange a defence. At [28 - 31] the Judge found that the mother had been validly served as there was an Affidavit of Service confirming that she was personally served with the relevant documents on 3rd October 2017.

Furthermore he held that, albeit that service was only effected 15 days prior to the hearing rather than the 21 days provided for in FPR PD6B, he could apply his discretion to use his powers in accordance with FPR 4.1(3) to shorten the time for service as no injustice would be caused to the mother given she had solicitors in Spain and had been afforded ample time in which to respond with an acknowledgement of service, evidence and / or any submissions regarding jurisdiction had she wished to do so and, accordingly, that he was able to proceed to judgment.

When addressing the question of the court's jurisdiction pursuant to Article 8 of Brussels IIA on the basis of S's habitual residence the Judge at [9], sets out in detail the various factors to be taken into account when determining a child's habitual residence; underlined by the fundamental principle that, as per Mr Justice Peter Jackson in *Re F (Habitual Residence)* [2014] EWFC 26, the court must conduct a factual enquiry tailored to the circumstances of the individual case.

Having considered those factors, at [32-34] the Judge concluded that the court did have jurisdiction pursuant to Article 8 of Brussels IIA as S was habitually resident in the UK on the basis that, immediately prior to his removal to Spain, he had been living in England with his parents and sister for a year, was attending an English school, had acquired the English language, and embedded himself in his community, and that those factors were not negated by his having also retained links in Spain whilst in the UK and / or the fact that S had begun to be reintegrated into his Spanish routine at the time of the judgment.

At [36] the Judge went on to make a declaration that the mother's failure to return S from Spain on 23rd August was a breach of the father's rights of custody under the applicable provisions of the 1996 Hague Convention which he was exercising at the time of S's removal.

As S had been wrongfully retained in Spain, the Judge also had to consider whether the court's jurisdiction was not undermined by Article 10 of Brussels IIA which, if satisfied, would mean that the UK court's jurisdiction could not be maintained as the provisions of Article 10 had not been fulfilled and therefore the court retained substantive jurisdiction over S pursuant to Article 8 of Brussels II [37].

The Judge then considered what orders, if any, he should make in respect of S. At [41 and 42], he decided that it was not appropriate or necessary to establish S's views in order to make interim orders regarding contact before ordering that S be returned to the jurisdiction of England and Wales. He also ordered that S should have "proper" contact with his father, to include overnight contact, in compliance with s.1(2A) of the Children Act 1989, S's rights under Article 24 of the EU Charter and Article 9 of the

United Nations Charter of Fundamental Rights, so that he could resume his relationship with his father and so that this could inform an assessment by CAFCASS of S and any recommendations that the relevant CAFCASS officer would be making to the court regarding the medium term orders that should be put in place pending a final decision.

Permission

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